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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 TANNER D. BARBER,

12 Petitioner,

13 v.

14 JEFFREY A. UTTECHT,

15 Respondent.

CASE NO. 19-5348 RJB-JRC

ORDER DENYING MOTION FOR
RECONSIDERATION

16 THIS MATTER comes before the Court on Petitioner's Motion for Reconsideration (Dkt.
17 19) of the Order Adopting the Report and Recommendation of U.S. Magistrate Judge J. Richard
18 Creatura (Dkt. 17). The Court has considered the motion and the remaining file.

19 In this 28 U.S.C. § 2254 habeas corpus petition, the Petitioner challenges a state court
20 conviction of several counts of rape of a child and child molestation and the resulting January 11,
21 2019 sentence. Dkt. 1. His direct appeal is pending in the Washington Court of Appeals Div. II;
22 the appellants' brief is due October 1, 2019. *Washington v. Barber*, Washington Court of
23 Appeals Div. II case number 531313. On July 29, 2019, the Report and Recommendation was
24 filed, recommending that this petition be denied without prejudice for failing to exhaust state

1 court remedies on any of the claims. Dkt. 15. Over Petitioner’s objections, the Report and
2 Recommendation was adopted. Dkt. 17. Issuance of a certificate of appealability was also
3 denied. *Id.*

4 Petitioner now files a motion for reconsideration, asserting that this Court has original
5 jurisdiction over his case and that he need not exhaust his claims in state court. Dkt. 19.
6 Petitioner has also filed a Notice of Appeal of the Order Adopting the Report and
7 Recommendation to the Ninth Circuit Court of Appeals. Dkt. 20.

8 **Jurisdiction While Case is on Appeal.** Once a notice of appeal is filed from a final
9 judgment, the district court is divested of jurisdiction. *Laurino v. Syringa General Hosp.*, 279
10 F.3d 750, 755 (9th Cir. 2002); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58- 59
11 (1982). Under Fed. R. Civ. P. 62.1(a)(2), “if a timely motion is made for relief that the court
12 lacks authority to grant because of an appeal that has been docketed and is pending, the court
13 may . . . deny the motion.”

14 This case is on appeal with the Ninth Circuit Court of Appeals. This Court lacks
15 jurisdiction to consider the issues raised in Petitioner’s pleading. Pursuant to Rule 62.1,
16 Petitioner’s motion should be denied. Moreover, if this Court had jurisdiction to consider the
17 motion, it would deny the motion.

18 **Motion for Reconsideration.** Local Rule W.D. Wash. 7 (h)(1) provides: “[m]otions for
19 reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a
20 showing of manifest error in the prior ruling or a showing of new facts or legal authority which
21 could not have been brought to its attention earlier with reasonable diligence.”

22 If this Court had jurisdiction to consider the motion, Petitioner’s Motion for
23 Reconsideration (Dkt. 19) should be denied. “State prisoners seeking a writ of habeas corpus
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1 from a federal court must first exhaust their remedies in state court. A petitioner has exhausted
2 his federal claims when he has fully and fairly presented them to the state courts.” *Woods v.*
3 *Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014)(citing 28 U.S.C. § 2254(b)(1)(A) and *O’Sullivan v.*
4 *Boerckel*, 526 U.S. 838, 844–45, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)). As stated in the prior
5 order, the Petitioner has not fully presented any of his claims to the state appellate courts. His
6 first direct appeal is pending. Briefing is not complete in that case. The Petitioner has failed to
7 exhaust his state court remedies as required by 28 U.S.C. § 2254(b)(1)(A). The authority
8 Petitioner’ cites does not support his position that he need not exhaust his claims in state court.
9 His remaining assertions are without merit.

10 It is **ORDERED** that:

- 11 • Pursuant to Fed. R. Civ. P. 62.1, Petitioner’s Motion for Reconsideration (Dkt.
12 19) **IS DENIED**.

13 The Clerk is directed to send uncertified copies of this Order to Judge Creatura, all
14 counsel of record, and to any party appearing *pro se* at said party’s last known address.

15 Dated this 17th day of September, 2019.

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17 ROBERT J. BRYAN
18 United States District Judge
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